Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Distribution and Carriage	)	

COMMENTS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

In adopting rules to implement Section 19 of the Cable Television Consumer Protection Act of 1992, the Commission must remain true to Congress' intent. The Commission should be guided by Congress' desire for an expedient system that will assure emerging multichannel video programming distributors fair access to the cable programming services consumers demand. Unfortunately, the *Notice of Proposed Rule Making* devotes far less attention to lowering barriers to entry than it spends on advancing proposals to raise unnecessary barriers. Before adopting rules to implement Section 19, the Commission must fundamentally rethink its approach, or else consumers will be denied the benefits of competition that Congress intends. Rather than give each phrase of Section 19 the most restrictive reading possible, as the *NPRM* does, WCA urges the Commission to paint with the same broad brush as Congress.

Specifically, the rules implementing Section 19 must provide remedies not only for violations of the specific conduct enumerated in Section 628(c), but also implement the more general prohibition set forth in Section 628(b). Those remedies must be available against any programmer in which a cable operator has an attributable interest, regardless of whether the complainant directly competes against that cable operator. While the Commission may require a complainant under subsection (b) to demonstrate that the purpose or effect of the action complained of is to hinder its competitive offering, the Commission cannot impose similar requirements on complainants under Section 628(c).

Except under the limited circumstances provided for in Section 628, existing agreements should not be grandfathered, for that will only delay bringing consumers the benefits of competition. Moreover, in implementing Section 628(c), the Commission must establish burdens of proof and discovery rules that are consistent with Congress' intent and reflect the difficulties that aggrieved parties will have in securing evidence of wrongdoing.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, [1] hereby submits its initial comments in response to the *Notice of Proposed Rule Making* ("*NPRM*") commencing the captioned proceeding. [2] For the reasons set forth below, WCA urges the Commission to adopt rules implementing Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") [3] in a manner that fulfills Congress' intent of providing consumers with the full benefits of vigorous competition in the video marketplace.

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[1] 47 C.F.R. § 1.415 (1992).

[2] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket No. 92-265, FCC 92-543 (rel. Dec. 24, 1992) [hereinafter cited as "*NPRM*"].

[3] Pub. L. No. 102-385, 102 Stat. 1460 (1992).

I. INTEREST OF WCA.

With the *NPRM*, the Commission seeks public comment as to how it can best respond to the directive of the 1992 Cable Act that the Commission address the difficulties non-cable multichannel video programming distributors have encountered in securing fair access to the video programming services consumers demand. As the trade association of the wireless cable industry, WCA is vitally interested in the outcome of this proceeding. Among WCA's members are the operators of virtually every wireless cable system operating today in America. [4] Simply stated, this proceeding is critical to the future of the wireless cable industry, for there is not a single wireless cable system operating today that is not being denied access to popular video programming networks or paying discriminatory prices for at least some of the programming that is made available.

Unfortunately, while the Commission has in the past recognized that competition to cable could not flourish until Congress assured emerging technologies fair access to programming, [5] the tenor of the *NPRM* suggests that the Commission may be retreating from its long-standing commitment to promoting competition in the video marketplace.

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[4]In addition, WCA's members include equipment manufacturers and licensees of Multipoint Distribution Service and Instructional Television Fixed Service stations that are leased by wireless cable operators to relay cable and broadcast programming over the airwaves to subscribers.

[5]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 5 FCC Rcd 4962 (1990) [hereinafter cited as "*FCC Report*"].

Admittedly, Section 19 of the 1992 Cable Act is not a model of clarity, and the Commission faces a difficult task in implementing it. However, with the *NPRM* the Commission seems so preoccupied with resolving every real or imagined issue concerning Section 19 that it has lost sight of Congress' fundamental goal -- to assure consumers the benefits of competition that can only emerge if potential competitors have fair access to programming.

Congress left no doubt of its intentions regarding program access. The stated goal of Section 19 "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."[6] In the comments that follow, WCA will provide the Commission with suggestions as to how the Commission can best achieve Congress' goal. First, however, WCA will provide the Commission with a summary of the record before Congress. While WCA believes that it is inappropriate for the Commission to even suggest that it must independently evaluate the need for Section 19,[7] a review of the record of misconduct that was before Congress should provide the Commission with a better appreciation of the scope and seriousness of the problem Congress expects the Commission to solve.

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[6]47 U.S.C. § 548(a).

[7]*See NPRM, supra* note 2, at ¶¶ 10-12.

II. BACKGROUND OF SECTION 19.

The enactment of the program access provisions of the 1992 Cable Act marks the culmination of five years of effort by WCA and others to secure fair access to the programming that alternative service providers need to break the cable monopoly. During that period, representatives of WCA testified fourteen times before Senate and House committees and submitted extensive documentation regarding the difficulties WCA's members have encountered in obtaining rights on fair terms and conditions to distribute the programming a multichannel video programming distributor must offer in order to compete. [8]

With the benefits of 20/20 hindsight, the hew and cry over rising cable rates, deteriorating service, self-serving program carriage decisions and anti-competitive conduct

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[8] *See* Testimony of James M. Theroux, WCA Regulatory Affairs Chairman, Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights (March 17, 1988); Testimony of Mark Foster, Chairman, The Microband Companies Inc. Before The United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights (March 17, 1988); Testimony of Robert L. Schmidt, WCA President, before the House Subcommittee on Telecommunications and Finance (June 15, 1988); Testimony of Robert L. Schmidt, WCA President, before the House Subcommittee on Economic and Commercial Law (March 14, 1989); Testimony of Robert L. Schmidt, WCA President, before the Senate Subcommittee on Communications (June 21, 1989); Testimony of Joseph W. Hipple III, PCTV Partners, before the House Subcommittee on Telecommunications and Finance (April 19, 1992); Testimony of Robert L. Schmidt, WCA President, before the Senate Subcommittee on Communications (March 14, 1991).

In addition, WCA was an active participant in MM Docket No. 89-600, the proceeding that led to the Commission's 1990 *Report* to Congress on the state of competition in the cable industry. *See* Comments of Wireless Cable Ass'n, MM Docket No. 89-600, at 39-57 (filed Mar. 1, 1990); Reply Comments of Wireless Cable Ass'n, MM Docket No. 89-600, 24-32 (filed April 2, 1990).

that followed in the aftermath of the Cable Communications Policy Act of 1984 (the "1984 Cable Act") and led to the passage of the 1992 Cable Act should have come as no surprise. The fundamental premise of the 1984 Cable Act -- that cable would be subject to effective competition -- proved faulty. [9] As even the cable industry has been forced to concede, [10] in virtually every community in America cable possesses undue market power stemming from its *de facto* monopoly over the distribution of multiple channels of video programming. Indeed, the body of evidence presented to Congress over the past five years firmly established that once freed from any meaningful governmental oversight by the 1984 Cable Act, the cable industry ran roughshod over potential competitors, reinforced its monopoly over the local distribution of multichannel programming by

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[9]*See, e.g.* H.R. No. 102-628, 102d Cong., 2d Sess., at 26 (1992) [hereinafter cited as "House Report").

[10]In seeking preferential tax treatment, Telecommunications, Inc., the largest cable television system operator in the United States, has candidly acknowledged that "a cable operator serving a city has a monopoly in the same sense that customers desiring cable service will have no choice regarding the provider of that service." Reply Brief of Telecommunications, Inc., *Telecommunications, Inc. v. I.R.S.*, 95 T.C. 36 (Nov. 7, 1990). Viacom International, Inc., another of the nation's largest operators of coaxial cable systems, conceded in a complaint filed with the United States District Court that "[e]ach cable operator is a monopolist in its local market or possesses a monopoly share approaching 100 percent." *Viacom International Inc. v. Time Incorporated*, Complaint, 89 Civ. 3139 (SDNY, filed May 9, 1989). Similarly, R.E. ("Ted") Turner, certainly one of the foremost authorities on cable television, has averred in a complaint filed with the United States District Court that cable operators exercise "monopoly power." *See Cable News Network, Inc. v. Satellite News Channel*, Civ. Act. File No. C83-430A, Complaint (N.D.Ga. filed Mar. 3, 1983).

extracting concessions from programmers in exchange for carriage, and abused its market power to the detriment of consumers. [11]

With passage of the 1992 Cable Act, Congress acknowledged that the factual predicate for its 1984 deregulatory action was wrong and that cable continues to exercise undue market power as a result of its *de facto* monopoly. Indeed, Section 2(a)(2) of the 1992 Cable Act specifically provides that:

> most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers. [12]

Despite Congress' recognition that it erred in 1984, the legislative history of the 1992 Cable Act makes it rather clear that Congress has not abandoned its preference for competition over regulation. To the contrary, the 1992 Cable Act represents Congress' effort to rein in the cable industry by promoting the emergence of competition, while imposing interim regulation appropriate for a monopoly where a competitive marketplace

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[11]That abuse continues unabated today. Recently, *Communications Daily* reported that a substantial number of year-end cable rate increases exceeded the national average growth of cable costs, and that cable rate increases during the past year were averaging 5%, while the consumer price index during the same period only rose 3%. *See* "Upward Trend Indicated By Latest Check Of Cable Rate Increases," *Communications Daily*, at 1 (Dec. 30, 1992).

[12]1992 Cable Act, at § 2(a)(2) (emphasis added). *See also, e.g.* House Report, *supra* note 9, at 30 ["the competition to cable system operators from other providers of video programming that the Committee anticipated during consideration of the 1984 Act, such as wireless and private cable operators, cable overbuilders, the home satellite dish market, and direct broadcast satellite operators, largely has failed to [emerge]"].

has yet to develop. The Senate Committee on Commerce, Science, and Transportation (the "Senate Committee") stated in no uncertain terms in its Report on S.12 that "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace." [13] Similarly, the House Committee on Energy and Commerce (the "House Committee") made clear in its Report on H.R. 4850 that "[a] principal goal . . . is to encourage competition from alternative and new technologies, including competing cable system[s], wireless cable, direct broadcast satellites, and satellite master antenna television services." [14]

A. Wireless Cable Can Provide Meaningful Competition, But Only If It Can Provide Consumers With Ready Access To The Cable Networks They Demand.

Congress' explicit recognition that the wireless cable industry represents one of the most promising sources of competition to the current cable monopoly should come as no

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[13]S.R. No. 102-92, 102d Cong., 1st Sess., at 1 [hereinafter cited as "Senate Report"]. *See also id.* at 12 ["the Committee prefers competition to regulation"]; *id.* at 18 ["It has been the longstanding policy of the Committee to rely, to the maximum extent feasible, upon greater competition to cure market power problems"]; *id.* ["A cable system serving a local community, with rare exceptions, enjoys a monopoly. . . . This demonstrates the need to encourage competition . . . ."]

[14]House Report, *supra* note 9, at 27. *See also id.* at 44 ["The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace."]; *id.* at 30 ["The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed."].

surprise to the Commission.[15] When the Commission first allocated spectrum for wireless cable almost a decade ago, it anticipated that wireless would provide much needed competition to the cable monopoly.[16] Since then, the Commission has frequently acknowledged that wireless cable is today "one of the most promising sources of multichannel competition in the local market."[17] Indeed, over the past two years the Commission has invested a substantial amount of regulatory time and energy to modify the rules and policies governing wireless cable so as to promote its competitive potential.[18]

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[15]*See, e.g.* Senate Report, *supra* note 13, at 14-15; House Report, *supra* note 9, at 44-45.

[16]*See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 F.C.C.2d 1203, 1228 (1983); *Various Methods of Transmitting Program Material to Hotels and Similar Locations*, 99 F.C.C.2d 715 (1983).

[17]*See, e.g. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, FCC 89-600 at 20 (rel. Dec. 29, 1989). *See also, e.g. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971 (1990); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992); *American Television and Communications Corp.*, 4 FCC Rcd 4707 (1989). *See also* "Sikes: Competition's the Key to Changing Video Marketplace," *Cable World*, at 22 (Nov. 13, 1989).

[18]A full description of those efforts can be found at *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 n. 8 (1992).

Wireless cable can be an effective source of competition to cable because, as the Commission has correctly noted, wireless cable can be a close substitute for cable television "in the nature of the programming it provides and its multichannel character."[19] Despite the well-documented barriers to entry imposed by the Commission's convoluted licensing scheme, wireless cable systems are already up and running in approximately 100 different communities across the nation, serving more than 600,000 subscribers.[20] And, with the recent emergence of the wireless cable industry has come empirical proof that wireless cable systems can compete with coaxial cable operations *if they can secure fair access to the programming demanded by the public* [21]

Wireless cable operators have already proven that they are ready, willing and able to provide consumers with access to independent programming services not carried by

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[19]*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971 (1990).

[20]While the wireless success stories are certainly encouraging, they pale in comparison to what wireless could accomplish with fair and equitable access to programming. As Senator Slade Gorton (R-WA) put it: "With any kind of good luck, and reasonable business opportunity, hundreds if not thousands of systems, with millions of subscribers" will be operating in the future. Remarks of Hon. Slade Gorton before The Wireless Cable Association, Inc. (Sept. 12, 1989).

[21]*See* Sims, "'Wireless' Challengers Nipping at Cable Operators,"*N.Y. Times*, at D12 (June 12, 1989).

vertically integrated coaxial cable systems.[22] Competition from wireless cable systems with access to critical programming has already spurred cable operators to construct their systems rapidly.[23] Wireless has already been cited as motivating competing coaxial systems to develop marketing plans that result in lower costs to the consumer.[24] And, perhaps most importantly, wireless cable is having a dramatic impact on cable's pricing.[25]

B. Congress Had Before It Ample Evidence That The Cable Monopoly Has Systematically Employed Its Market Power To Quash Competition

As WCA advised Congress during the proceedings leading up to the 1992 Cable Act, in reviewing the particulars of the wireless success stories to date, one common thread emerges -- those wireless systems that are most successful are those few that have

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[22]During the infamous 1989 dispute between Cablevision Systems Corp. ("Cablevision") and Madison Square Garden Network ("MSG") during which Cablevision refused to carry MSG, the wireless cable system in New York was the sole provider of MSG to areas of Brooklyn and The Bronx for which Cablevision holds the sole cable franchise. *See* Jaffe, "Wireless operators suggest they can solve cable's political dilemma," *Cablevision*, at 63 (Aug. 28, 1989).

[23]In Detroit, MI, for example, competition from the local wireless cable operator is believed to be largely responsible for completion of the local cable system almost a year ahead of schedule. Similarly, there is no question that a major upgrade of the local cable system in Charlottesville, VA is attributable to the introduction of wireless cable competition.

[24]*See* "Cable's slow to warm up to Dolan clustering plan," *Cable World*, at 4 (July 17, 1989).

[25]Stump, "Toe to Toe with a Wireless Competitor," *Cable World*, at 28-29 (Oct. 5, 1992; "In the Trenches: Cable vs. Wireless, How Do Cable Operators Fight Back Against Price-cutting Competition?", at 13 (Aug. 24, 1992); Kerver, "Wireless Cable: Friend or Foe," *Cablevision*, at 20-24 (Oct. 5, 1992).

been able to secure fair access to the programming services demanded by consumers.[26] The moral is clear -- wireless cable operators must be able to provide their subscribers with a channel lineup similar to that of the cable competition.[27] Indeed, a 1988 Congressional study concluded that:

> The overwhelming majority of consumers who watch cable television have access to only one source of cable programming, The local cable operating system enjoys a virtual veto over any programming that the consumer wishes to see. . . . [T]here are alternative technologies which can provide competition to existing cable television systems. However, the survey also shows that companies using these alternative technologies have difficulty purchasing the most popular forms of programming -- HBO, Cinemax, ESPN and the like. *It is simply a reality of the marketplace that, without some of these popular sources of programming, a firm cannot compete with an established cable system.*[28]

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[26]*See, e.g.* Testimony of Robert L. Schmidt, WCA President, before the Senate Communications Subcommittee, at 4 (March 14, 1991).

[27] NTIA reached a similar conclusion in 1988, observing that "the long-term viability of [wireless cable], even as a niche business, will depend in large part on operators' ability to acquire and retain programming that will attract subscribers." Nat'l Telecommunications & Information Admin., "NTIA Telecom 2000," at 491. As *Broadcasting* succinctly reported, "[i]f wireless cable is to take its place alongside conventional cable in the pay television marketplace, it will have to be able to offer its subscribers all the popular programming services that the conventional version does." "Bob Schmidt: champion with a new cause," *Broadcasting*, at 72 (Oct. 17, 1988). *See also* Meeks, "The Wireless Wonder," *Forbes*, at 60 (Feb. 19, 1990);

[28]*See* Subcommittee on Antitrust, Committee on the Judiciary, United States Senate, *Survey on the Availability of Programming to Cable Competitors*, at 5-7 [hereinafter cited as "*Senate Survey on Cable Competition*"]. None of this should surprise the Commission. Former Chairman Sikes has acknowledged that "[r]easonable access to programming is an essential ingredient to facilities-based competition in the video services field." Statement of Alfred C. Sikes on FCC Cable Television Policies, Recommendations, and Initiatives Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, at 14 (Nov. 17, 1989) [hereinafter cited

(continued...)

. The record before Congress established beyond peradventure that the inability of wireless cable and other emerging technologies to secure fair access to programming was the result of a distorted marketplace. While programmers fashioned a thousand and one excuses for their conduct (many of which the *NPRM* mistakenly accepts as valid), there was ample and persuasive evidence before Congress that wireless and other potential competitors were being discriminated against because of the excessive market power enjoyed by the cable operators over the distribution of programming; that programmers owned by the MSOs were favoring affiliated cable systems; and that those programmers that remained "independent" could be cowed by the economic monopsonistic power wielded by the cable monopoly.

Congress' determination that cable operators have the ability to retard the growth of competition by limiting the flow of programming cannot be doubted for an instant. In

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[28](...continued)
as "Sikes Testimony"]. Commissioner Quello has observed that "[c]hannel capacity and programming are essential ingredients for wireless cable's ability to compete in the future video distribution marketplace." Speech by FCC Commissioner James H. Quello before the Wireless Cable Association's Fifth Annual Int'l Exposition and Conference, at 6 (del. July 28, 1992). Commissioner Duggan has voiced similar views. "Inquire Whose Son This Stripling Is . . . ," Remarks of Hon. Ervin S. Duggan before the Wireless Cable Ass'n (del. July 23, 1991). Commissioner Marshall has forthrightly noted that "[a]ccess to desirable programming at fair prices is the key to the competitive viability of . . . potential challengers to cable." "Balancing the Power of Cable," Remarks of Hon. Sherrie P. Marshall before the Fed. Communications Bar Ass'n, at 6 (del. Mar. 7, 1990). Little wonder, then, that the Commission's 1990 *Report* to Congress on the state of competition in the cable industry found that "[r]easonable access to programming is important for achieving effective competition among program distributors and fostering maximum possible public choice." *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5031 (1990).

passing the 1992 Cable Act, Congress had substantial evidence before it that cable operators possess both the incentive and ability to penalize a programmer who deals with an alternative technology by such tactics as refusing carriage to uncooperative services and repositioning uncooperative services to channels that cannot be received on many television sets without special converters leased at extra cost from the cable system. As Congress discovered, cable systems have a documented history of manipulating their control over the carriage of programming services in order to advance their own interests. There were myriad reports in the public record before Congress of how cable operators have destroyed programming services by refusing carriage,[29] obtained rate concessions

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[29]In 1984, for example, Music Television ("MTV"), the 24 hour music network, announced that it was raising the rates it charged cable operators. Turner Broadcasting System, Inc. ("TBS") responded by announcing its intention to produce a competing music network that would not charge cable operators. After threatening to back TBS's competing service if concessions were not granted by MTV, TCI took advantage of the TBS announcement to negotiate a new reduced rate, long-term agreement with MTV. TCI's decision to stay with MTV sounded the death knell for TBS's competitive venture. As TCI's John Malone stated afterward, the favorable contract between TCI and MTV "really eliminated the base Ted [Turner] needed." Landro, "Tele-Communications Sets Cable-TV Agenda," *Wall St.J.*, at 6 (Feb. 11, 1986) [hereinafter cited as "TCI Sets Cable Agenda"].

Similarly, when National Broadcasting Company ("NBC") was considering the initiation of a news service to compete with CNN, TCI initially supported NBC's plans. However, after CNN made significant price concessions to TCI, TCI announced that it would not carry the planned NBC service. "Without a commitment from Tele-Communications, NBC was unable to get the subscribers needed to proceed with a competing network." *Id.*

As one programming executive complained about his dealings with TCI:

(continued...)

by expressly or impliedly threatening to cease carriage,[30] obtained equity in programmers in exchange for express or implied commitments of carriage,[31] and eliminated competition through express or implied threats to programmers who proposed to distribute through alternative technologies.[32] Indeed, just days before the Senate overwhelmingly passed

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[29](...continued)

> [w]e always had to back down. It's a simple equation. Without TCI no program channel can survive. Period. They enjoy a feared position in the industry. They are bullies.

See Powell, "Cable's Biggest Leaguer," *Newsweek*, at 40 (June 1, 1988) [hereinafter cited as "Cable's Biggest Leaguer"].

[30]*See id.* Similarly, TCI proved formidable in 1984 when ESPN -- then the nation's largest cable network -- attempted to raise TCI's rates. TCI threatened to drop the service, and ESPN backed down. *See id.*; "Cable Network Programming Universe," *Broadcasting*, at 40 (May 30, 1988).

[31]As *Broadcasting* has aptly noted "cable operator ownership and equity participation -- the foot soldiers of vertical integration -- have rapidly become the quid pro quo for launching new services." "Vertical Integration," *Broadcasting*, at 40 (Nov. 23, 1987). Simply stated, potential programmers are forced "to offer equity stakes to operators to insure carriage." *Id.* Given that TCI is sufficiently large to, in the words of one Showtime executive, "make or break" a new network, it is not surprising that the backers of virtually every new programming service to debut of late have felt compelled to provide equity interests to TCI in order to assure carriage. *See id.*, at 41-42; "The Cable Network Programming Universe," *Broadcasting*, at 40 (May 30, 1988); "Cable Operators Make The Equity Play," *Broadcasting*, at 66 (Nov. 23, 1987). As *Broadcasting* has reported: "cable operator ownership and equity participation -- the footsoldiers of vertical integration -- have rapidly become the quid pro quo for launching new services." "Vertical Integration: The business behind the boom in cable programming," *Broadcasting*, at 40 (Nov. 23, 1987).

[32]In 1985, for example, TBS, Showtime (neither of which were then owned by TCI) and ESPN ran afoul of TCI when they attempted to compete with TCI by assembling a package of services for distribution to home satellite dish owners. Those plans were dropped when TCI (the largest customer for the TBS, Showtime and ESPN programming (continued...)

S.12, the *Wall Street Journal* reported both that threats by TCI to drop The Learning Channel apparently permitted a subsidiary to acquire the network in a bankruptcy proceeding at a substantially lower price than other bidders were willing to pay prior to TCI's threat to discontinue carriage, and that TCI has systematically used its market power to extract rate concessions from programmers.[33] Faced with this sort of power, and a willingness to use it, it is no wonder that Congress passed Section 19 to protect programmers and potential competitors alike.

Given cable's history of quashing competitive threats to its local monopoly,[34] the evidence placed before Congress of cable's reaction to the potential of wireless cable should have been predictable. In hearings and informal meetings during the late 1980's, Congress became well aware that:

> The wired cable companies are dealing with the wireless threat with closed fists. Their ultimate weapon: control over programming, without which the wireless systems will surely wither.[35]

As one wireless system operator observed:

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[32](...continued)
services), reportedly expressed its displeasure to the three programmers. Not insignificantly, soon thereafter TCI began to market its own package of programming to home dish owners -- a package which included ESPN, Showtime and TBS's CNN. *See* Cable's Biggest Leaguer, *supra* note 29, at 40.

[33]Roberts, "Cable Cabal: How Giant TCI Uses Self-Dealing, Hardball To Dominate Market", *Wall St. J.*, at A1 (Jan. 27, 1992).

[34]*See supra* note 32.

[35]The Wireless Wonder, *supra* note 27, at 60.

> cable system operators are using black-mail to stop program suppliers from selling to [wireless cable]. . . . Several [program suppliers] flatly stated they wouldn't do business with [wireless cable] because the cable-TV industry would drop them if they dealt with anybody but cable.[36]

That explains why a Senate subcommittee concluded that "alternative technologies have difficulty purchasing the most popular forms of programming -- HBO, Cinemax, ESPN and the like."[37]

The facts before Congress concerning programming availability painted a simple picture of abuse. Initially, absent special circumstances, most of the popular programming services generally were not available to the wireless cable industry on any terms and conditions. WCA presented Congress with extensive evidence that programmers were unjustifiably refusing to deal with the wireless cable industry. A few examples are illustrative of the initial problem:

- HBO, Showtime and SportsChannel New York, all of which are vertically integrated, initially refused to enter into arrangements with wireless cable operators despite offers of significant financial guarantees and other inducements).

- Black Entertainment Television, which is partially owned by TCI, was made available initially for use on one wireless operator's systems in Detroit and New York, but not for use by the same operator in Washington, where TCI controls the franchised cable system .

- CableMaxx, which provides a wireless cable service in uncabled areas surrounding Austin, Texas, was initially unable to secure access to Showtime, The Movie Channel, HBO, Cinemax, or TNT, despite offering to post letters of credit equal to several months expected billings.

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[36]Block, "A Cable Cartel?," *Forbes*, at 82 (Feb. 10, 1986).

[37]*Senate Survey on Cable Competition*, *supra* note 13, at 6.

- People's Choice TV Partners ("PCTV"), a well-financed wireless cable operator whose principals have extensive experience in cable and other communications businesses, reported difficulty securing wireless cable affiliation agreements with HBO, Cinemax, Showtime, TMC, TNT, The Disney Channel, ESPN, AMC, SportsChannel America or Home Sports Entertainment.

- Prime Ticket Network, which holds exclusive rights to home games of the popular Los Angeles Lakers and Kings, refused to enter into any affiliation with Wireless of Los Angeles ("WLA"), even though WLA's coverage area would include uncabled areas.

- TNT has advised countless wireless cable companies that it has awarded three year exclusive contracts to cable operators. Although WLA and others have sought to distribute TNT to areas not covered by those exclusive contracts, they have been unable to secure authorization.[38]

More recently, WCA testified before Congress that the nature of the problem had shifted. Although TNT and many regional sports services remain holdouts, one result of five years of Congressional scrutiny is that most of the other programming services now

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[38]The refusal of TBS to make TNT available to the wireless cable industry is particularly troublesome. Since TBS makes its other programming services available to the wireless community, it is obvious that TBS's refusal is not related to concerns about financial ability, signal quality or piracy. The marketing of TNT only to cable systems (even at the cost of potential wireless viewers where no cable exists) can only be explained as stemming from the vertical integration of TNT with a consortium of large MSOs.

The wireless industry suffers tremendous hardship as a result of its inability to provide consumers with TNT. Because TBS aggressively cross-promotes TNT on its other programming services, wireless cable subscribers are constantly made aware that they are missing out on a program service available only from cable. Particularly as TNT has exclusive rights to National Football League games and other special events, TBS's cross-marketing will make wireless subscribers painfully aware that they are "second class citizens."

will do business with wireless cable.[39] However, the rates being charged and the terms and conditions being imposed are discriminatory. *See, e.g.* Testimony of Robert L. Schmidt, WCA President, before the Senate Communications Subcommittee, at 8-9 (March 14, 1991); Testimony of Robert L. Schmidt, WCA President, Before the Senate Communications Subcommittee, at 11 (Nov. 17, 1989). Little wonder, then, that Congress determined that:

> vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors.[40]

WCA believes that, if implemented in a manner consistent with Congressional intent, Section 19 of the 1992 Cable Act will yield a marketplace that is substantially more hospitable to wireless cable and other competitive multichannel video programming distributors than before.[41] With the adoption of Section 19 of the 1992 Cable Act, Congress has begun the process of addressing that problem. Unless the Commission

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[39]WCA has seen troubling signs since passage of the 1992 Cable Act that refusals to deal may become a significant problem once again. Apparently, some programmers were on their "best behavior" while Congress was considering cable legislation. Now that legislation has passed and it likely will be some time before Congress reconsiders the cable industry, there are signs that some programmers may be planning to take advantage of loopholes and ambiguities in Section 19 to avoid dealing with wireless cable on fair terms and conditions.

[40]Senate Report, *supra* note 13, at 26.

[41]*See* "Cable Act Called 'Success' For Wireless Cable, Despite Loopholes", *Communications Daily*, at 2 (Dec. 2, 1992); Neel, "Wireless Update", *Cable World*, at 9 (Dec. 7, 1992).

ignores Congress' mandate, or falls prey to the inevitable entreaties by cable for implementing rules that undercut Congress' intent, Section 19 should guarantee competitors access to many of the cable program services that are today not available on fair terms and conditions. And that, Congress has determined will permit competition to flourish and provide consumers with the benefits of lower prices, diversity of programming and better service.

III. THE COMMISSION MUST PROMULGATE SPECIFIC RULES IMPLEMENTING SECTION 19 DESIGNED TO PROMOTE, RATHER THAN FRUSTRATE, CONGRESS' GOAL OF PROMOTING THE EMERGENCE OF COMPETITION

In crafting Section 19 of the 1992 Cable Act, Congress sought to advance two complementary policies: to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" and to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[42] Section 628(a) specifically provides that "its purpose . . . is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."[43] As noted above, Congress was well-aware of the problems caused by vertical integration, and made the policy choice of risking some of

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[42]1992 Cable Act, § 2(b)(1) and (2).

[43]47 U.S.C. 548(a).

the short-run purported benefits of vertical integration in order to ensure the long-run benefits of facilities based competition in the video distribution marketplace.[44] While it is certainly true, as the *NPRM* notes, that Congressional policy is to "rely on the marketplace, to the maximum extent feasible", [45] it is equally true that Congress determined that the video programming marketplace was not working because of cable's local monopoly. Section 628 represents Congress' effort to right that marketplace. Now, the Commission must adopt the strict implementing rules necessary to make Section 628 an effective deterrent to any continuation of the abuses of the past, and enforce those rules with vigor. Then, and only then, will the fully competitive marketplace Congress desires flourish.

A. Congress Intended For The Commission To Regulate Under Section 628(b) Conduct Not Falling Within The Specific Restrictions Set Forth In Section 628(c).

In the *NPRM*, the Commission inquires as to "whether Congress intended for the Commission to regulate any additional 'unfair methods of competition or unfair or deceptive acts or practices' beyond those specified in Section 628(c)."[46] WCA submits that Congress most certainly did so intend.

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[44]While the issue is not directly before the Commission in this proceeding, WCA takes issue with the Commission's unquestioning acceptance of claims that vertical integration results in increase programming availability to consumers. As WCA documented in its comments in MM Docket No. 89-600, the propensity of cable operators to favor programming services they own has frequently resulted in the dropping of programming services highly valued by consumers.

[45]1992 Cable Act, § 2(b)(2).

[46]*NPRM, supra* note 2, at ¶ 13 n. 32.